

1 **DAVIS POLK & WARDWELL LLP**
2 Timothy Graulich (admitted *pro hac vice*)
3 timothy.graulich@davispolk.com
4 Marc J. Tobak (*pro hac vice* application
5 forthcoming)
6 marc.tobak@davispolk.com
7 David Schiff (admitted *pro hac vice*)
8 david.schiff@davispolk.com
9 450 Lexington Avenue
10 New York, New York 10017
11 Telephone: (212) 450-4000
12 Facsimile: (212) 701-5800

13 *Counsel for Citibank N.A., as Administrative Agent*
14 *for the Utility Revolving Credit Facility*

15 **UNITED STATES BANKRUPTCY COURT**
16 **NORTHERN DISTRICT OF CALIFORNIA**
17 **SAN FRANCISCO DIVISION**

18 **In re:**

19 **PG&E CORPORATION**

20 **- and -**

21 **PACIFIC GAS AND ELECTRIC**
22 **COMPANY,**

23 **Debtors.**

24 Affects PG&E Corporation
25 Affects Pacific Gas and Electric
26 Affects both Debtors

27 ** All papers shall be filed in the Lead Case,*
28 *No. 19-30088 (DM).*

1 Case No. 19-30088 (DM)

2 Chapter 11

3 (Lead Case)

4 (Jointly Administered)

5 **CROSS-MOTION OF ADMINISTRATIVE**
6 **AGENT FOR LEAVE TO APPEAL ORDER**
7 **REGARDING POSTPETITION INTEREST**

1 Pursuant to 28 U.S.C. § 158(a)(3) and Federal Rule of Bankruptcy Procedure 8004,
2 Citibank, N.A., as administrative agent (in such capacity, the “**Administrative Agent**”) under that
3 certain Second Amended and Restated Credit Agreement dated as of April 27, 2015 (as amended,
4 supplemented or otherwise modified) (the “**Credit Agreement**” and the credit facility governed
5 thereby, the “**Utility Revolving Credit Facility**”) among Pacific Gas and Electric Company and
6 several lenders from time to time party thereto, hereby cross-moves (the “**Cross-Motion**”) the
7 United States District Court for the Northern District of California (the “**District Court**”) for an
8 order permitting the Administrative Agent to participate in any appeal, to the extent that the District
9 Court concludes that any appeal may proceed either as of right or on an interlocutory basis, of the
10 (i) *Interlocutory Order Regarding Postpetition Interest* [ECF No. 5669] entered on February 6,
11 2020 (the “**PPI Order**”) and (ii) *Memorandum Decision Regarding Postpetition Interest* [ECF
12 No. 5226] entered on December 30, 2019 (the “**PPI Memorandum**”) by the United States
13 Bankruptcy Court for the Northern District of California (the “**Bankruptcy Court**”). Copies of
14 the PPI Order and PPI Memorandum are attached hereto as **Exhibit A** and **Exhibit B**, respectively.
15 In support of its Cross Motion, the Administrative Agent respectfully states as follows:
16

17 1. On February 20, 2020, the Ad Hoc Committee of Holders of Trade Claims (the
18 “**Trade Committee**”) moved for leave to appeal the PPI Order [ECF No. 5845] (the “**Trade
19 Committee Motion For Leave**”), arguing that the PPI Order is final and appealable as of right or,
20 if found to in fact be an interlocutory order, is appropriate for an immediate appeal to be heard by
21 the United States District Court for the Northern District of California (the “**District Court**”). The
22 Administrative Agent does not take a position on the merits of the Trade Committee Motion for
23 Leave. However, in the event that the District Court agrees with the Trade Committee and permits
24 its appeal to go forward, the Administrative Agent submits it should be granted leave to participate
25 in the resulting appeal.
26
27
28

1 2. The PPI Memorandum and PPI Order followed the litigation of a multi-party
2 contested matter before the Bankruptcy Court (the “**PPI Dispute**”) regarding the rate at which
3 creditors are entitled to receive postpetition interest under a plan of reorganization in PG&E
4 Corporation’s and Pacific Gas and Electric Company’s chapter 11 cases (the “**Cases**”). The Trade
5 Committee and the Administrative Agent were each parties to the PPI Dispute with numerous
6 other creditors and creditor representatives (collectively, the “**Creditor Parties**”). Pursuant to an
7 order of the Bankruptcy Court [ECF No. 4540], the Creditor Parties were required to (and did)
8 submit joint briefing in connection with the PPI Dispute.

9
10 3. Although a chapter 11 plan has been proposed in the Cases, none has yet been
11 confirmed or consummated, and the outcome of the PPI Dispute (and any appeal of the PPI
12 Memorandum and PPI Order) could have a material economic impact on the treatment of claims
13 under the Credit Agreement. Accordingly, the Administrative Agent has an interest in the outcome
14 of any appeal of the PPI Memorandum and PPI Order and should be permitted to participate if any
15 other party’s (including, without limitation, the Trade Committee’s) appeal goes forward for any
16 reason.

17 4. Accordingly, the Administrative Agent respectfully requests that its Cross-Motion
18 be granted and the Administrative Agent be permitted to participate in any immediate appeal of
19 the PPI Order and PPI Memorandum, regardless of whether such appeal permitted to proceed as a
20 matter of right or on an interlocutory basis.

1 DATED: March 5, 2020

2 **DAVIS POLK & WARDWELL LLP**

3 /s/ *Timothy Graulich*

4 TIMOTHY GRAULICH

5 MARC J. TOBAK (*pro hac vice* application
forthcoming)

6 DAVID SCHIFF

7 ANDREW D. YAPHE (SBN 274172)

8 *Counsel for Citibank N.A., as Administrative
9 Agent for the Utility Revolving Credit
10 Facility*

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT A



Signed and Filed: February 6, 2020

Lewis Montalb

DENNIS MONTALI
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

INTERLOCUTORY ORDER REGARDING POSTPETITION INTEREST

On December 30, 2019, the court issued a Memorandum Decision Regarding Postpetition Interest (Dkt. No. 5226). For reasons stated on p. 17 of the memorandum, the court deferred issuing an appealable order at that time. Since then, the disputed and somewhat related issue described by all parties as the Make-Whole issue has been tentatively resolved without a decision by the court. For that reason, the court believes an

order on the postpetition interest issue is appropriate at this time.

Parties adverse to the Debtors on the postpetition interest issue have disagreed on what the court should do now. One group, the Ad Hoc Committee of Holders of Trade Claims, wants a certification that the court's decision and ensuing order is final under Fed. R. Civ. P. 54(b), incorporated via Fed. R. Bank. P 7054 and a direct certification of such an order or an interlocutory order to the court of appeals under 28 U.S.C. § 158(d)(2). The other group, the Ad Hoc Committee of Senior Unsecured Noteholders, wants the court to defer any action until it confirms Debtors' Plan of Reorganization under 11 U.S.C § 1141, thus making the underlying decision on postpetition interest final for all purposes.

The court has considered the arguments of both sides, and the somewhat neutral position of the Debtors at a hearing on February 4, 2020. Under the circumstances, the court decides not to adopt either sides' position and to leave the question of dealing with an interlocutory order for another court if there is an appeal.

Accordingly, and as an interlocutory order, the court concludes that the Debtors are correct, that *In re Cardelucci*, 285 F.3d 1231 (9th Cir. 2002) controls and that the Federal Interest Rate applies to the postpetition treatment of unsecured creditors under any Chapter 11 Plan of Reorganization proposed by Debtors.

END OF INTERLOCUTORY ORDER

EXHIBIT B

MEMORANDUM DECISION REGARDING POSTPETITION INTEREST

I. INTRODUCTION

On December 11, 2019, the court heard oral argument on the discrete legal issue of the applicable postpetition interest to be paid to four classes of allowed unsecured and unimpaired claims, under any chapter 11 reorganization plan for solvent debtors PG&E Corporation and Pacific Gas and Electric Company ("Debtors"). The Debtors, joined by certain Shareholders, argue that creditors in all four classes should receive interest

1 calculated pursuant to 28 U.S.C. § 1961(a) (the "Federal
2 Interest Rate") in effect as of the petition date (January 29,
3 2019) these chapter 11 cases. That rate for these jointly
4 administered cases is 2.59 percent. Debtors contend that use of
5 the Federal Interest Rate is consistent with *In re Cardelucci*,
6 285 F.3d 1231 (9th Cir. 2002) ("Cardelucci"), which holds that
7 unsecured creditors in a solvent case should receive
8 postpetition interest calculated at the Federal Interest Rate.

9 Several parties, including the Official Committee of
10 Unsecured Creditors, the Ad Hoc Committee of Senior Unsecured
11 Noteholders, the Ad Hoc Committee of Holders of Trade Claims and
12 others (collectively "Unsecured Creditors") oppose the motion.
13 They urge application of various rates, generally determined by
14 applicable contracts between the Debtors and the respective
15 claimants, judgment rates or some other rate.

16 For the following reasons, the court concludes that the
17 Debtors are correct, that *Cardelucci* controls and that the
18 Federal Interest Rate applies to any Plan.

19 II. APPLICABLE LAW

20 Statutory construction of the Bankruptcy Code¹ is "a
21 holistic endeavor" requiring consideration of the entire
22 statutory scheme. *United Sav. Ass'n of Texas v. Timbers of*
23 *Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371, 108 S.Ct. 626,
24 98 L.Ed.2d 740 (1988), cited by *In re BCE West, L.P.*, 319 F.3d
25 1166, 1171 (9th Cir. 2003).

26
27
28 ¹ Unless otherwise indicated, all chapter and section
references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

1 In *Timbers*, the Supreme Court utilized this holistic
2 approach to analyze five seemingly unconnected provisions of
3 Title 11 in determining that oversecured creditors are entitled
4 to receive postpetition interest. Applying a similar holistic
5 approach, this court has looked to the structure of the
6 Bankruptcy Code and the purposes behind its many parts to
7 conclude while unsecured creditors are entitled to postpetition
8 interest in a solvent estate, the Bankruptcy Code requires
9 application of the Federal Interest Rate to those claims and
10 that such an application does not impair these claims. Even if
11 *Cardelucci* were not binding, the court would reach the same
12 conclusion.

13 Chapter 5, subchapter I ("Creditors and Claims") of the
14 Bankruptcy Code sets forth the guiding principles for filing and
15 allowance of claims or interests, administrative expenses,
16 determination of secured status and other provisions not
17 important to the current analysis. In contrast, the court must
18 apply the critical provisions of chapter 11, subchapter II ("The
19 Plan"). Section 1123(a) states what a plan "shall" do or
20 include. Section 1123(b) states what a plan "may" do or
21 include. As a definitional matter, section 1124 explains that a
22 class of claims or interest is impaired unless the plan leaves
23 certain legal, equitable and contractual rights unaltered (§
24 1124(1)), or cures, restates, or compensates the rights of class
25 or interest members (§ 1124(2)(A)-(E)).

26 The structure of the Bankruptcy Code and the applicability
27 of these definitional and empowering sections, therefore,
28 dictate rights that are fixed as of the petition date and what

1 rules apply after that. Nothing suggests that, absent specific
2 rules, provisions dealing with prepetition entitlements carry
3 over postpetition. For example, section 502(b)(2) clearly
4 provides that a claim for "unmatured interest"² may not be
5 allowed. An exception to the rule is found in section 506(b)
6 that permits accrued interest to be allowed as long as the
7 security is "greater than the amount of such claim."

8 The Unsecured Creditors' argument that somehow the
9 definitions and remedies found in section 1124 override the
10 plain impact of section 502(b)(2) is simply not persuasive and
11 would require the court to ignore not only the plain words of
12 the statute but also the holistic notion of treating them as
13 part of a combined comprehensive instrument of definitions,
14 applicability and implementation. Section 1124(1) describes
15 what claims are unimpaired and section 1124(2) describes what is
16 necessary for a plan to "unimpair" impaired claims. In
17 contrast, chapter 5 ("Creditors and Claims") dictates how claims
18 and interests are dealt with in the substantive chapters: 7, 11,
19 12 and 13. The subparts of section 502(b) list nine specific
20 rules for affecting allowed claims.

21 An example not directly related to this case proves the
22 point. Section 502(b)(4) disallows the claim of an insider or
23 an attorney to the extent it exceeds the reasonable value of the
24 services. Unsecured Creditors could not persuade the court or
25 even make a convincing argument that somehow an insider or an
26 attorney whose asserted claim exceeds a reasonable value could

27
28 ² No one has suggested that "unmatured interest" means
anything other than "postpetition interest."

1 take refuge in section 1124((1)'s definitional provision and
2 escape the clear intention of Congress to limit unreasonable
3 claims for services in the same manner it has limited
4 postpetition unsecured claims for unmatured interest. For the
5 same reason, underlying non-bankruptcy law must give way to
6 contrary provisions of the Bankruptcy Code. *Travelers Cas. &*
7 *Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 444
8 (2007) (quoting *Raleigh v. Illinois Dept. of Revenue*, 530 U.S.
9 15, 20 (2000)).

10 With that background, the court turns to the applicability
11 of *Cardelucci* and its clear message.

12 III. THIS COURT'S RESPONSIBILITY UNDER STARE DECISIS

13 This court is bound by the Ninth Circuit's *Cardelucci*
14 decision unless it can be distinguished or overruled:

15 Courts are bound by the decisions of higher courts
16 under the principle of *stare decisis*. The doctrine
17 derives from the maxim of the common law, "Stare
18 *decisis et non quieta movere*," which literally means,
19 "Let stand what is decided, and do not disturb what is
settled." See 1B Jeremy C. Moore et al., *Moore's*
20 *Federal Practice ¶ 0.402[1]* (2d ed. 1992). *Moore's*
21 treatise describes the rule as follows:

22 The rule, as developed in the English law,
23 is that a decision on an issue of law
24 embodied in a final judgment is binding on
the court that decided it and such other
courts as owe obedience to its decisions, in
all future cases. *Id.*

25 Under this principle a decision of a circuit court of
26 appeal is binding on all lower courts in the circuit,
27 including district courts and bankruptcy courts
(absent a contrary United States Supreme Court
decision). *Zuniga v. United Can Co.*, 812 F.2d 443, 450
(9th Cir. 1987).

1 This is true even if there is a split of opinion
2 between the controlling circuit and another circuit
3 court of appeals, and the lower court believes that
4 the controlling circuit court is in error. *Zuniga*,
5 812 F.2d at 450; *Hasbrouck v. Texaco, Inc.*, 663 F.2d
6 930, 933 (9th Cir. 1981)[.]

7 In re Globe Illumination Co., 149 B.R. 614, 617 (Bankr. C.D.
8 Cal. 1993) (multiple internal citations omitted).

9 *Cardelucci* is a published panel opinion by the Court of
10 Appeals for the Ninth Circuit. It is binding on this court.
11 *State Farm Fire & Cas. Ins. Co. v. GP West, Inc.*, 2016 WL
12 3189187, 90 F. Supp.3d 1003, 1018 (D. Haw. 2016) (citation and
13 internal quotation marks omitted). See *Lair v. Bullock*, 798 F.3d
14 736, 747 (9th Cir. 2015) ("[W]e are bound by a prior three-judge
15 panel's published opinions,") (citing *Miller v. Gammie*, 335
16 F.3d 889, 892-93 (9th Cir. 2003) (en banc)).

17 IV. THE HOLDING OF CARDELUCCI

18 In *Cardelucci*, the Ninth Circuit framed the issue before it
19 as follows:

20 This appeal presents the narrow but important
21 issue of whether such post-petition interest is
22 to be calculated using the (federal judgment
23 rate) or is determined by the parties' contract
24 or state law.

25 *Cardelucci*, 285 F.3d at 1231.

26 The Ninth Circuit held that in chapter 11 cases involving
27 solvent debtors, unsecured creditors are entitled to
28 postpetition interest at the federal judgment rate, not at not

1 at contractual or state statutory rates. *Id.* at 1234. In so
2 holding, the Ninth Circuit observed that application of the
3 lower federal judgment rate did not violate an unsecured
4 creditor's substantive due process rights (*id.* at 1236) and that
5 utilization of federal judgment rate for all claims was
6 rationally related to legitimate interests in efficiency,
7 fairness, predictability, and uniformity within bankruptcy
8 system. *Id.*

10 While the court pinpointed a "narrow but important
11 issue," it did not narrow the application of its holding,
12 which must be applied broadly given the structure of the
13 Bankruptcy Code and the clear and plain meaning of its
14 applicable provisions, as noted above.

16 In *Cardelucci*, the debtor and his opponents, holders of a
17 state court judgment, set aside various differences and thereby
18 permitted confirmation to proceed subject to a reservation of
19 rights concerning the applicable postpetition interest rate.³
20 The Ninth Circuit concluded that the reference by Congress to
21 "the legal rate" in section 726(a)(5) was intentional, in that
22

24 ³ While the opinion is silent on the specifics of that
25 debtor's plan, the opponents' claim was impaired for reasons not
26 relevant to this analysis. In the present case the Unsecured
27 Creditors' claims are unimpaired. The Unsecured Creditors put
28 the cart before the horse when they contend that the application
of the "fair and equitable" test of section 1129(b) determines
that their claims are impaired under section 1124.

1 Congress had rejected proposed language of "interest on claims
2 allowed." *Cardelucci*, 285 F.3d at 1234. The court also
3 emphasized that a single, easily determined rate for all
4 postpetition interest ensures equitable treatment of creditors.⁴
5 Although *Cardelucci* was a chapter 11 case, the reference to
6 section 726(a)(5) was critical. Without that reference, the
7 court would be compelled by section 502(b)(2) to allow claims
8 "except to the extent that . . . (2) such claim is for unmatured
9 interest."⁵ There is no specific provision in chapter 11 that
10 allows any interest on unsecured claims.⁶ Without that
11 reference, Unsecured Creditors would be left with no allowed
12 postpetition interest.
13

14 The rule in the seventeen years since *Cardelucci* is clear:
15 unsecured creditors of a solvent debtor will be paid the Federal
16 Interest Rate whether their prepetition contracts call for
17 higher or lower rates, or applicable state law judgment rates
18

20
21 ⁴ In this case, given the vast array of creditors' claims, the
22 equal application of such uniform policy is all the more
23 compelling.

24 ⁵ The exception found in section 506(b) for secured claims has
25 no bearing here.

26 ⁶ The court rejects the argument by the Ad Hoc Committee of
27 Holders of Trade Claims that section 103(b) precludes
28 consideration of section 726(a)(5). *Cardelucci* merely compared
the chapter 7 outcome (apply the Federal Interest Rate) as part
of the "best interest" test of Section 1129(a)(9) to compare
whether creditors do better in chapter 7 or chapter 11.

1 are higher, or there are no other applicable rates to consider.
2 Nor is that rule limited to impaired claims. *Cardelucci* is
3 unequivocal and articulates several reasons for broad
4 application of its holding despite the recognition of the narrow
5 issue presented:

- 6 1. The use of the term "legal rate" indicates the Congress
7 intended the single source to be statutory because of the
8 common use of the term when the Bankruptcy Code was
enacted.
- 9 2. Using the federal rate promotes uniformity within federal
law.
- 10 3. The analogous post-judgment interest entitlement
compensates for being deprived of compensation for the
loss of time between ascertainment of damages and
payment.
- 11 4. Application of a single, easily determined rate ensures
equitable treatment of creditors.
- 12 5. With a uniform rate, no single creditor will be eligible
for a disproportionate share of the remaining assets.

13 *Cardelucci*, 285 F.3d at 1235-1236.

14 The Unsecured Creditors refer to the opinion's "parting
note" to support their cause. The actual conclusion rejects a
15 substantive due process argument that has not been developed
16 here for good reasons. To this court, the "parting note" that
17 dooms their cause is in the penultimate paragraph, and bears
18 repeating:

19 The Court recognizes that these two interests,
20 fairness among creditors and administrative
21 efficiency, may be of limited relevance in certain
22 bankruptcy proceedings. Where there are only a few
23 unsecured creditors seeking post-petition interest and
24 there are sufficient assets to pay all claims for all

1 interest (sic), there will be no concerns regarding
2 equity among creditors or practicality. In those
3 instances, a debtor may receive a windfall from the
4 application of a lower federal interest rate to an
5 award of post-petition interest. Nonetheless 'interest
6 at the legal rate' is a statutory term with a
7 definitive meaning that cannot shift depending on the
8 interests invoked by the specific factual
9 circumstances before the court. *See In re Thompson*, 16
10 F.3d 576, 581 (4th Cir. 1994).

11 *Cardelucci*, 285 F.3d at 1236.

12 Unsecured Creditors' reliance on older cases invoking the
13 "absolute priority" rule in defense of postpetition interest at
14 the contract rate are unavailing. *Consolidated Rock Products*
15 *Co. v. Du Bois*, 312 U.S. 510 (1941), was decided under the
16 former Bankruptcy Act and is of questionable viability now that
17 the Bankruptcy Code includes sections 726(a)(5) and 502(b)(2).
18 Similarly, *Debentureholders Protective Committee of Continental*
19 *Inv. Corp. v. Continental Inv. Corp.*, 679 F.2d 264 (1st Cir.
20 1982), was decided under Chapter X of the former Bankruptcy Act
21 and thus offers no guidance here.

22 The Ninth Circuit's decision in *L&J Anaheim Associates v.*
23 *Kawasaki Leasing International, Inc.* (*In re L&J Anaheim*
24 *Associates*), 995 F.2d 940 (9th Cir. 1993) does not change the
25 outcome. *L&J Anaheim* was decided only a few months after
26 *Cardelucci* and did not cite it, as it addressed an altogether
27 different issue.

28 In *L&J Anaheim*, a secured creditor filed a chapter 11 plan
that was opposed by the debtor. In order to achieve the
statutory requirement for at least one impaired class, the
creditor, Kawasaki, proposed changing its own state law remedies

1 following debtor's breach. It eliminated its right to exercise
2 various remedies under the California Uniform Commercial Code,
3 replacing those entitlements under its proposed plan with a
4 requirement that its collateral and a related lawsuit be sold at
5 public auction under procedures mandated by the Bankruptcy Code.

6 In determining that Kawasaki's rights were altered, and
7 thus its claim was impaired, the court stated:

8 At first blush the idea that an improvement in ones'
9 position as a creditor might constitute 'impairment'
seems nonsensical."

10 *L & J Anaheim*, 995 F.2d at 942.

11 The court examined the term of art adopted by Congress to
12 replace language in the prior Bankruptcy Act and concluded that
13 section 1124 created certainty in determining whether or not a
14 creditor was impaired. Once again, section 1124 is
15 definitional, describing improvement in the context of the plan
16 presented as impairment. The court had no occasion to address
17 whether, for an impaired class, postpetition interest was even
18 relevant.

19 Of importance here is that the plan's own language altered
20 Kawasaki's rights; in the present case, the Bankruptcy Code, and
21 not the Plan, is what causes Unsecured Creditors to have their
22 postpetition interest limited to the Federal Judgment Rate. The
23 Plan is not the culprit.

24 A few months after *Cardelucci*, the Ninth Circuit decided
25 *Platinum Capital, Inc. v. Sylmar Plaza, L.P. (In re Sylmar*
26 *Plaza, L.P.*, 314 F.3d 1070 (9th Cir. 2002). There, the court
27 addressed whether or not a plan proponent had proposed the plan
28

1 in good faith under section 1129(a)(3) when its sole purpose was
2 to enable the debtors to cure and reinstate an obligation. At
3 that time, *Great W. Bank & Trust v. Entz-White Lumber and*
4 *Supply, Inc. (In re Entz-White Lumber and Supply, Inc.)*, 850
5 F.2d 1338 (9th Cir. 1988), was good law. Under *Entz-White*, plan
6 proponents were permitted to cure defaults under former section
7 1124(3), leaving the objecting creditor not impaired under
8 section 1124. Perhaps predicting the crucial distinction
9 between what a plan does and what the Bankruptcy Code does, the
10 *Sylmar Plaza* court rejected the argument that a plan lacks good
11 faith when it permits owners of a solvent debtor to avoid paying
12 postpetition interest at the default interest rate. The fact
13 that a creditor's contractual rights are adversely affected does
14 not by itself warrant a bad faith finding. Quoting the
15 bankruptcy court in *In re PPI Enters. (US)*, 228 B.R. 339
16 (Bankr. D. Del. 1998), the court stated:

17 In enacting the Bankruptcy Code, Congress made a
18 determination that an eligible debtor should have the
19 opportunity to avail itself of a number of Code
provisions which adversely altered creditors'
contractual and non bankruptcy rights

20 The fact that a debtor proposes a plan which it avails
21 itself of an applicable Code provision does not
22 constitute evidence of bad faith.

23 *Sylmar Plaza*, 314 F.3d at 1075 (citations omitted).

24 Cases cited by the *Sylmar Plaza* creditor to support a per
25 se rule were distinguishable in that neither adopted or approved
26 such a rule and, moreover, ". . . because none involved an
objection to a plan by an unimpaired creditor." *Id.*

1 At oral argument counsel for one of the Unsecured Creditors
2 argued that *Cardelucci* has been superseded by *In re New*
3 *Investments, Inc.*, 840 F.3d 1137 (9th Cir. 2016). That argument
4 is unavailing. The *New Investments* decision concludes that the
5 1994 amendments to section 1124 abrogated the holding of *Entz-*
6 *White* that default interest rates could be eliminated by curing
7 defaults under a plan. The decision does not even mention
8 postpetition interest or *Cardelucci* and does not deal with
9 unimpaired claims under section 1124(1) and thus is of no
10 bearing on the issue presented or the outcome here.

11 V. IMPAIRED OR UNIMPAIRED CLAIMS ARE TREATED ALIKE

12 Unsecured Creditors attempt in vain to escape *Cardelucci's*
13 impact by arguing that, unlike the impaired claim there, their
14 claims will be unimpaired under a plan. The court rejects
15 Unsecured Creditors' argument.

16 First, *Cardelucci*, in answering the narrow question, drew
17 no distinction as to whether the rule it announced was confined
18 only to impaired claims. The clear and unequivocal analysis
19 based on section 726(b)(5) is obvious: it applies to all
20 unsecured and undersecured claims in a surplus estate.

21 Second, no plan compels the payment of the Federal Interest
22 Rate. Rather, the Bankruptcy Code does. A similar analysis was
23 applied very recently by the Fifth Circuit in *In re Ultra*
24 *Petroleum Corporation*, ___ F.3d ___, 2019 WL 6318074 (November
25 26, 2019). There, the court contrasted the treatment of
26 creditors' claims outside of bankruptcy and whether the plan
27 itself was a source of limitation on their legal, equitable and
28 contractual rights, or rather the Bankruptcy Code. The court

1 looked to the language of section 1124(1), defining not impaired
2 when the plan ". . . leaves unaltered [the claimant's] legal,
3 equitable and contractual rights." The court ruled that a claim
4 is impaired only if the plan itself does the altering, not what
5 the Bankruptcy Code does.

6 *Ultra Petroleum* agreed with the only other court of appeals
7 decision to draw the distinction between what a plan might do
8 and what the Bankruptcy Code does do. *In Solow v. PPI*
9 *Enterprises (U.S.) Inc. (In re PPI Enterprises (U.S.) Inc.)*, 324
10 F.3d.197 (3d Cir. 2003) the court upheld confirmation of a plan
11 notwithstanding a limitation on an objecting landlord's
12 statutorily capped damages under section 502(b)(6). It held that
13 where section 502(b)(6) alters a creditor's non-bankruptcy
14 claim, there is no alteration of the claimant's "legal,
15 equitable and contractual rights" for purposes of impairment
16 under section 1124(1). *Id.* at 203.

17 The *PPI Enterprises* court agreed with the bankruptcy
18 court's analysis in *In re American Solar King Corp.*, 90 B.R. 808
19 (Bankr. W.D. Tex. 1988) where the bankruptcy court made the
20 following very thoughtful observation:

21 A closer inspection of the language employed in
22 [s]ection 1124(1) reveals 'impairment by statute to be
23 an oxymoron.' Impairment results from what the plan
24 does, not what the statute does. A plan which 'leaves
25 unaltered' the legal rights of a claimant is one which
26 by definition, does not impair the creditor. A plan
27 which leaves a claimant subject to other applicable
28 provisions of Bankruptcy Code does no more to alter a
claimant's legal rights than does a plan which leaves
a claimant vulnerable to a given state's usury laws or
to federal environmental laws. The Bankruptcy Code
itself is a statute which, like other statutes, helps

1 to define the legal rights of person's, just as surely
2 as it limits contractual rights. Any alteration of
3 legal rights is a consequence not of the plan but of
4 the bankruptcy filing itself.

5 *American Solar*, 90 B.R. at 819-20.

6 The *Ultra Petroleum* court noted that decisions from
7 bankruptcy courts across the country have reached the same
8 conclusion, agreeing that impairment results from what a plan
9 does, not from what a statute does. Its conclusion reinforces
10 the point:

11 We agree with *PPI*, every reported decision identified
12 by either party, and Collier's treatise. Where a plan
13 refuses to pay funds disallowed by the Code, the Code
14 - not the Plan - is doing the impairing.

15 *Ultra Petroleum*, 2019 WL 6318074 at *5.

16 Like the creditors in *Ultra Petroleum*, the Unsecured
17 Creditors' complaint is with Congress and the Bankruptcy Code,
18 not the drafters of a Plan. The Bankruptcy Code, not the Plan,
19 limits them to the Federal Interest Rate.⁷ The cases cited by
20 Unsecured Creditors do not apply here, as the rights in those
21 cases were impaired by the plan and not by operation of law. See
22 *Acequia, Inc. v. Clinton (In re Acequia)*, 787 F.2d 1352, 1363
23 (9th Cir. 1986) (shareholder voting rights altered by plan); *In*
24 *re Rexford Properties, LLC*, 558 B.R. 352, 368 (Bankr. C.D. Cal
25 2016) (creditor's rights regarding ongoing business altered by
26 plan).

27 There is no point in discussing section 1124(2), as that
28 subsection is not relevant to the treatment of the four not

7 For the same reason, creditors who hold contractual claims calling for interest lower than 2.59% will fare better under the Plan.

1 impaired classes. Were Debtors to have proposed a treatment of
2 the Unsecured Creditors' claims that cured, reinstated, or
3 reversed any acceleration, then the analysis might be helpful.
4 But because section 1124(1) is the operative section here, that
5 ends the discussion.

6 Because the Plan leaves the Unsecured Creditors' claims not
7 impaired, there is also no need to dwell on whether or not "fair
8 and equitable" principles apply. They do not. Unimpaired
9 Creditors, when treated as dictated by the Bankruptcy Code, are
10 not impaired by the Plan. They are conclusively presumed to
11 have accepted the Plan. Section 1126(f). Section 1129(b) is
12 not available to them.⁸

13 VI. CONCLUSION

14 As a trial court in the Ninth Circuit, this court is bound
15 to follow *Cardelucci* unless, as a matter of principled
16 reasoning, it can be distinguished. No such grounds exist. The
17 1994 amendments to section 1124 predated *Cardelucci*. Thus,
18 whether or not *Cardelucci* addressed the issue is not the point.
19 Its rule is the law of this circuit until altered either by an
20 *en banc* panel, the United States Supreme Court, legislation or
21 some other controlling change in the law.

22 Even were *Cardelucci* not controlling, this court would
23 follow the lead of *PPI* and *Ultra Petroleum* (and the lower court
24 decisions cited by *Ultra Petroleum*), and reject the contention

25
26 ⁸ For this reason, the court rejects as incorrect the
27 bankruptcy court's reliance *In re Energy Future Holdings*, 540
28 B.R. 109 (Bankr. D. Del. 2015) on "equitable principles" to
permit unsecured creditors in a solvent case to recover a
contract rate or such other rate as it deemed appropriate.

of Objecting Creditors that imposition of the Federal Interest Rate impairs them. It is the Bankruptcy Code itself, not any plan provision, that imposes that rate.⁹

4 The court is not concurrently entering an order consistent
5 with this Memorandum Decision as was the case with its recent
6 decision in the Inverse Condemnation action (Dkt. No. 4895).
7 Because of the close relationship between the postpetition
8 interest question and the issues presented in the forthcoming
9 Make-Whole dispute, orders disposing of them both at the same
10 time seems appropriate and efficient. Whether either or both
11 questions should be certified for direct appeal or to treated as
12 final for purposes of Fed. R. Bankr. P. 7054, can be visited
13 later.

END OF MEMORANDUM DECISION

⁹ *Ultra Petroleum* remanded the case to the bankruptcy court to decide the appropriate Make-Whole amounts, the appropriate postpetition interest rate, and the applicability of the solvent-debtor exception. If the three judges on the Fifth Circuit panel had been members of the Ninth Circuit, there is no doubt they would have been bound by *Cardelucci*, thus limiting the remand to the Make-Whole issue.